under section 8(1A) of the Internal Security Act, 1960, purporting to extend the period(s) of an order of detention made under section 3(1) of the Preservation of Public Security Ordinance, 1955, in respect of Wee Toon Lip @ Ng Toon Lee @ Ng Soon Yee @ Wee Zoon Lip N.R.I.C. No. S3W. 05674 (OLD) of 33 Greenmeade Avenue, Singapore and dated the 23rd day of October 1965 and the 23rd day of October 1967 respectively.

This Order shall take effect immediately without prejudice to the previous validity of such Orders hereby cancelled or to anything done thereunder.

Dated this 20th day of November, 1967.

Sd: Lim Kim San
(Lim Kim San)
Minister of Defence,
Singapore."

The argument is that the Minister had no power to order the cancellation of the earlier order made on 23rd October 1967 which was an order of extension of a detention order. The power to make an order of extension is conferred by section 8(1A) of the Act on the President of the Republic and on the true construction of section 82(3) the President, and not the Minister, has the power to cancel an order of extension. I accept that argument and indeed it is conceded on behalf of the respondents but it is of no real assistance to the applicants.

On the same day as the orders of cancellation were made, four fresh detention orders were made under section 8(1)(a) of the Act and the argument is advanced on behalf of the applicants that the fresh detention orders and the cancellation orders were interdependent so that they must all stand or fall together. This argument is manifestly untenable.

Another argument is that the President's mind was not properly directed to whether or not it was necessary for each of the four applicants to be detained under section 8(1) because the four fresh detention orders were made on the same day as the four orders of cancellation. That is an inference I am not prepared to make and in any event the argument is effectively met by an affidavit of the then Permanent Secretary to the Ministry of the Interior and Defence filed in these proceedings. Paragraph 4 of this affidavit reads: —

"I am familiar with all the facts relating to the detention of all the applicants herein. In this connexion, I crave leave to refer to the orders of cancellation made by my then Minister, the aforesaid Mr. Lim Kim San, and say that on or about the 20th day of November, 1967, the then Minister of Defence signed the aforesaid orders of cancellation exhibited in the aforesaid joint affidavit and that before he did so, he received the direction of the then President, who also directed that fresh orders of detention for a period of two years with effect from the 20th day of November, 1967, be issued against them".

In my judgment there can be no doubt at all that the four orders of detention made on the 20th of November 1967 in respect of the four applicants were valid and lawful orders and were in strict compliance with section 8 of the Act and in those circumstances the joint application for a writ of *habeas corpus* must fail and be dismissed with costs.

Application dismissed.

Solicitor: *T. T. Rajah.*

MALAYSIAN REPORTS

NADARASA v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Hamid J.) February 24, 1972]

[Kuala Lumpur — Criminal Appeal No. 56 of 1971]

Evidence — Burden of proof — Corruption charge — Prosecution to establish charge beyond reasonable doubt — Proof on balance of probabilities not applicable in criminal cases.

Bribery and Corruption — Charge of corruption — Burden of proof — Requisite onus on prosecution and defence — No presumption arising — Prevention of Corruption Act, 1961, s. 14.

The accused had been convicted for corruption under the Prevention of Corruption Act. He appealed on the ground that the president of the sessions court had misdirected himself on the burden of proof. The learned president in his grounds of judgment stated: "The burden of proof on the accused is as stated in *Public Prosecutor* v. *Yuvaraj*[3] but accused failed to prove on a balance of probability that the money came to be in his left trouser pocket as he had claimed." The question of any presumption under section 14 of the Act did not arise in this case.

Held, allowing the appeal: the learned president had gravely misdirected himself as to the burden of proof. Proof on balance of probabilities has no application in criminal cases. The fundamental principle in criminal cases is that the burden is throughout on the prosecution and it is not for the accused to prove his innocence. To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case.

Cases referred to:-

(1) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.
(2) *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 16.
(3) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89, P.C.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Hashim bin Abdul Majid (Deputy Public Prosecutor) for the respondent.

Abdul Hamid J. (delivering oral judgment): This is an appeal by Nadarasa alias Nadaraja son of Muthuthamby against the decision of the president of the sessions court in Klang who convicted the appellant on the following amended charge —

"That you on 17 November 1969 between 4.45 p.m. and 6.00 p.m. at No. 44, Jalan Thomson, Pandamaran New Village, Port Swettenham, in the District of Klang, in the State of Selangor, did corruptly receive for yourself gratification to wit cash $50.00 from one Te Bun Chin as inducement to your doing a proposed transaction to wit assisting the said Te Bun Chin in obtaining the citizenship certificate for one Te Loy Sang and Teh Sew Lai, and thereby committed an offence punishable under section 3(a)(i) of the Prevention of Corruption Act, 1961."

On conviction the appellant was fined $5,000 in default 2 years' imprisonment. The appellant has appealed on a number of grounds. I shall deal with the following —

(a) that the president erred in law (i) in misdirecting himself as to the burden of proof; not only the burden on the prosecution but that on the defence as well; and (ii) in failing to appreciate that the burden on the prosecution was not to prove the case on the "balance of probability" but to tender evidence which established the case against the appellant beyond all reasonable doubt.

Mr. Edgar Joseph Jr. counsel for the appellant in his submission cited a number of cases to show the effect of misdirection as to the burden of proof. (See *Mat* v. *Public Prosecutor*[1] followed in the case of *Mahadi* v. *Public Prosecutor*[2]). In this case, it can be seen that before the president convicted the appellant, he stated that he accepted the prosecution case as true on a balance of probability.

In his grounds of judgment, the president further said:

"The burden of proof on the accused is as stated in *Public Prosecutor* v. *Yuvaraj*[3] but accused failed to prove on a balance of probability that the money came to be in his left trouser pocket as he had claimed."

In the first place, it seems clear to me that the learned president gravely misdirected himself as to the burden of proof on the prosecution. Proof on balance of probabilities has no application in criminal cases. I think it is settled law that in criminal cases, it is an essential principle that a criminal charge has to be established by the prosecution beyond all reasonable doubt. The learned president also misdirected himself as to the burden of proof on the defence when he said in his grounds of judgment that the burden of proof on the accused is as stated in *Public Prosecutor* v. *Yuvaraj, supra,* and that in the instant case there was a failure of the accused on the balance of probabilities to show how the money came to be in his left trouser pocket as he had claimed. In *Yuvaraj's* case, the question was whether a presumption under section 14 of the Prevention of Corruption Act, 1961 was rebutted by a defence which is reasonable and probable or whether it can be rebutted only by proof that defence is on such fact the existence of which is so probable that a prudent man would act on the supposition that it exists.

It was held that —

"upon the true construction of the Evidence Ordinance, 1950, and the Prevention of Corruption Act, 1961, there is no relevant difference between the two descriptions of the burden of rebutting the presumption of corruption which are contained in the question if 'the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable' is understood as meaning 'the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961.'"

In the present case the question of presumption under section 14 does not arise. Different considerations might, however, arise if the appellant had been called upon for his defence on the original charge. Originally the appellant was charged in the capacity of councillor of the Town Council Klang, a member of a public body. It would therefore appear that the president has put too high a burden on the defence when in fact there was none. The president ought to have borne in mind that the fundamental principle in criminal cases is that the burden is throughout on the prosecution and it is not for the accused to prove his innocence. To entitle an accused to an acquittal, it is sufficient if after considering the defence, he has cast a doubt on the prosecution case.

After carefully considering the grounds of judgment, I have also found that the president had erred in failing to consider the defence. Thus in the circumstances of this case, I am unable to say what conclusion the president would have arrived at if he had properly directed his mind as to the burden of proof on the prosecution and the defence. I am also unable to say what conclusion the president would have arrived at if he had considered the defence.

For reasons which I have stated, I do not think I can allow the conviction to stand. The proper course to take in this case is to allow this appeal, set aside the conviction and sentence and order a retrial.

Appeal allowed. Retrial ordered.

Solicitors: *Joseph & Son.*

PONG KHEE KWEI v. TAN SAI KUY

[A.C.J. (Sharma J.) February 25, 1972]

[Ipoh — Civil Appeal No. 16 of 1971]

Landlord and Tenant — Agreement to let premises for rent — Whether created licence or tenancy — Whether a guile — Protection under Control of Rent Act, 1956 — Deposit paid more than statutory maximum — Whether illegal — Control of Rent Ordinance, 1956, s. 4(3) and Control of Rent Act, 1966, s. 10.

Landlord and Tenant — "Lease" and "licence" — Distinction between.

This was an appeal against the decision of the learned president, allowing the respondent/plaintiff's claim to possession of certain rent controlled premises.

The plaintiff's claim was based on an agreement dated September 22, 1965, which, it was alleged, only created a licence and not a tenancy of the premises in favour of the defendants. The defendants maintained that they were tenants and not mere licensees, and that the said agreement was only a guile to cover up what had been agreed upon between the parties. They therefore claimed the protection of the Control of Rent Act, 1966, and counterclaimed for the repayment of $5,000 which had been paid by them to the plaintiffs as a "deposit". No defence to the counterclaim was filed by the plaintiff at any time.

The learned president made an order for possession against the defendants and awarded the plaintiff damages. He dismissed the counterclaim with costs.

The defendant appealed.

The crucial question to be determined was whether the relationship between the parties was that of landlord and tenant or of a licensor and licensee.

Held, allowing the appeal: (1) the circumstances and conduct of the parties govern the nature and extent of their rights. The decisive consideration in determining such relationship is the intention of the parties. The court must look at the substance and reality of a transaction, not its form;

(2) the agreement of September 22, 1965, did not create a licence. In substance, it had the effect of a tenancy agreement;

(3) the appellants enjoyed a certain status of irremovability under the Control of Rent Act, 1966. The agreement relating to the deposit of $5,000 was illegal under section 10 of the Control of Rent Act, 1966, which allowed a maximum of an equivalent of 3 months rent to be received in advance by the respondent/landlord;

(4) therefore, the order of the learned president must be set aside, and judgment entered against the plaintiff for the sum of $5,000 and costs.

Observation on joints to be considered in determining whether the substance of a transaction creates a lease or a licence.